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October 13, 2010

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

**Re: Notice of *Ex Parte* Presentation
MM Docket No. 99-25 (LPFM Proceeding)**

Dear Ms. Dortch:

On Tuesday, October 12, 2010, Bayard H. ("Bud") Walters and John F. Garziglia met with Peter Doyle, Chief, Audio Division and James D. Bradshaw, Deputy Chief, Audio Division to discuss the attached October 7, 2010 filing by twenty-one commercial radio broadcasters.

Mr. Walters and Mr. Garziglia noted that the filing of the twenty-one commercial broadcasters was in response to the Commission's consideration of a September 22, 2010 revised Memorandum of Agreement from Educational Media Foundation and Prometheus Radio Project, and that the attached broadcasters' filing offers an alternative to the positions taken by EMF and Prometheus.

Mr. Walters and Mr. Garziglia explained how the EMF/Prometheus proposals would change the FCC's FM translator application rules midstream, in essence yanking the rug out from under those commercial broadcasters who followed the FCC's rules and procedures in filing applications under the set rules and procedures for the Auction No. 83 FM translator filing window.

It was emphasized that EMF and Prometheus are asking in their Memorandum of Agreement that the FCC's rules be changed by a results-oriented fiat on small and medium-size commercial broadcasters that only benefits EMF, Prometheus and other similarly situated non-commercial broadcasters. Mr. Walters and Mr. Garziglia advocated that, rather than favoring only one constituency, the FCC largely follow its established Auction No. 83 auction procedures – procedures adopted after extensive notice and comment; and procedures relied upon by all.

The ten application cap, which was instituted and then placed on hold by the FCC, pursuant to *Creation of Low Power Radio Service*, 22 FCC Rcd 21912 (2007), was also discussed.

It was requested that the Commission immediately open a settlement window for the existing applications in Auction No. 83, and thereafter proceed to an auction with applicants for commercial facilities, with a view toward allowing those applicants that filed FM translator applications in the Auction No. 83 filing window in good faith to utilize the existing and settled procedures set forth in the FCC's auction public notice and rules, without the Commission changing its rules and procedures in an *ex post facto* manner.

Respectfully submitted,

By /s/ John F. Garziglia
John F. Garziglia

cc: Peter H. Doyle, Chief, Audio Division, Media Bureau
James D. Bradshaw, Deputy Chief, Audio Division, Media Bureau



October 7, 2010

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: MM Docket No. 99-25 (LPFM Proceeding)

Dear Ms. Dortch:

The undersigned twenty-one commercial radio broadcasters who have FM translator applications pending in the Auction No. 83 FM translator filing window hereby comment upon, and offer an alternative to, the revised Memorandum of Agreement submitted by Prometheus Radio Project (“Prometheus”) and Educational Media Foundation (“EMF”) in this MM Docket No. 99-25 (the “LPFM Proceeding”).¹

**THE AUCTION NO. 83 APPLICATION PROPOSED PROCESSING PROCEDURE
CHANGES IN THE EMF/PROMETHEUS MEMORANDUM OF AGREEMENT ARE
CONTRARY TO THE PUBLIC INTEREST**

The undersigned commercial broadcasters oppose the bulk of the substantive procedural and rule changes proposed by EMF and Prometheus as only benefitting parties aligned with EMF and Prometheus while harming the public interest and the interests of commercial radio broadcasters whose FM translator applications remain pending in Auction No. 83.

In the Memorandum of Agreement, EMF and Prometheus request that substantial changes be made midstream to the established rules and procedures for processing FM translator Auction No. 83 applications. EMF and Prometheus propose that any Auction No. 83 applicant that has not to date had an application granted should have “the opportunity to provide an engineering solution that would allow one of their pending applications be granted” but

¹This letter responds to September 22, 2010 proposal filed by Prometheus and EMF jointly in which a revised Memorandum of Agreement was submitted (hereafter, the “Memorandum of Agreement”), as well as a September 17, 2010 filing by Prometheus and others, and a July 8, 2010 filing by Prometheus and EMF jointly, in which EMF and Prometheus propose certain delays and changes to the Auction No. 83 application processing procedures.

thereafter, all remaining Auction No. 83 applications be subject to over-filings by applications for LPFM facilities. This was not contemplated by FCC rules pertaining to Auction No. 83 nor the Public Notice announcing Auction No. 83.²

The EMF and Prometheus filings do not take into account the interests of the undersigned commercial radio broadcasters, nor do the EMF and Prometheus filings take into account the public interest in the reception of commercial radio broadcasting signals. Many commercial broadcasters, and the listening public, have now been waiting more than seven years since filing the Auction No. 83 FM translator applications for the enhanced service that such applications when acted upon will provide. The proposals set forth by Prometheus and EMF would substantially harm commercial broadcasters who relied upon the FCC's rules and policies to file Auction No. 83 FM translator applications while leaving EMF with hundreds of applications pending.

This letter sets forth the views of the undersigned commercial broadcasters who now have pending applications for FM translators in the Auction No. 83 filing window. Many of the undersigned commercial broadcasters desire to use FM translators for the rebroadcast of signal-deficient AM stations which has been acknowledged to be a substantial public interest benefit by the FCC.

THE AUCTION NO. 83 PUBLIC NOTICE SPECIFICALLY CONTEMPLATED A SETTLEMENT WINDOW AND SUBSEQUENT AUCTION FOR COMMERCIAL APPLICATIONS

In the Public Notice, the FCC specifically contemplated a settlement window for Auction No. 83 applications stating that:

MB and WTB will issue a public notice identifying mutually exclusive applications received during the window. This public notice also will specify a settlement period for resolving application mutual exclusivity by the filing of technical amendments, dismissal requests, and requests for approval of universal settlements (emphasis added).

As importantly, the FCC in the same Public Notice at Appendix A stated that:

Commercial applications that remain mutually exclusive after the settlement period closes will proceed to auction (emphasis added).

The undersigned commercial radio broadcasters request that the Commission now follow its established Auction No. 83 auction procedures and open the settlement window, and proceed to auction with commercial applications. After the commercial applications are acted upon, the

² See e.g. *FM Translator Auction Filing Window and Application Freeze*, DA 03-359, February 6, 2003 (hereafter, the "Public Notice").

FCC may then take whatever actions it, and those proponents of non-commercial translator and LPFM applications which presumably includes EMF and Prometheus, believe to be in the public interest with respect to pending non-commercial ("NCE") applications.

A SETTLEMENT WINDOW AND AUCTION FOR COMMERCIAL APPLICATIONS WILL NOT HARM THE GOALS OF EMF AND PROMETHEUS

This letter sets forth a proposal which takes into consideration the goals and aspirations of Prometheus and EMF as well as the undersigned commercial broadcasters. It is hoped that the proposal below will accommodate the needs and interests of all parties.

It is acknowledged that there are now, for better or worse, several thousand FM translator applications filed by certain NCE applicants in the Auction No. 83 translator filing window. The EMF and Prometheus proposals attempt to largely subject those several thousand filings to LPFM application over-filings while at the same time keeping those several thousand applications (many filed by EMF) pending to the extent that they are not over-filed.

The proposal below contemplates keeping the vast majority of the thousands of NCE applications on file and subjecting those applications to over-filings by what are presumably similarly situated NCE applicants for LPFM facilities, as requested by EMF and Prometheus. At the same time, however, the vastly smaller number of commercial applications filed in the Auction No. 83 FM translator window will no longer be held up over concerns regarding the preclusionary effects of the thousands of pending NCE applications.

MOST PENDING AUCTION NO. 83 FM TRANSLATOR APPLICATION MX GROUPS ARE COMPOSED OF NON-COMMERCIAL APPLICATIONS AND WILL NOT BE AFFECTED BY THIS PROPOSAL

There is no commercial broadcaster that comes anywhere near to having the hundreds or thousands of FM translator applications pending before the Commission as apparently do a number of NCE applicants. Rather, most commercial broadcasters, if having multiple applications at all, have Auction No. 83 translator applications numbering no more than in the single digits.

While it is unknown as a formal matter what is the composition of most mutually-exclusive FM translator application groups as the FCC has not yet released a listing of mutually exclusive applications from the Auction No. 83 filing window, a September 27, 2010 filing by Common Frequency in the LPFM Proceeding gives a good indication. In Appendix A to Common Frequency's September 27, 2010 filing, Common Frequency purports to list the mutually-exclusive application groups.

A quick review of Appendix A to Common Frequency's September 27, 2010 filing shows many of those application groups composed of applicants that appear to be only NCE applicants. Since the FCC Form 175s filed in Auction No. 83 have not yet been made public, however, there is no way for the public to conclusively determine which applicants filed for commercial

facilities, and which applicants filed for NCE facilities.³ Nonetheless, from the filings of EMF and Prometheus, it appears that they agree with the premise that the majority of the remaining Auction No. 83 applicants are NCE applicants. As noted below, pending groups of mutually-exclusive NCE applications will remain pending under this proposal and be subject to over-filings by LPFM applications as requested by EMF and Prometheus.

MUTUALLY EXCLUSIVE NON-COMMERCIAL APPLICATIONS CANNOT GO TO AUCTION AND SHOULD BE DEFERRED AS REQUESTED BY EMF AND PROMETHEUS

It is established Commission procedure that NCE applications are subject to dismissal if mutually-exclusive with an application filed for a commercial station unless all applicants successfully effect a settlement agreement or provide an engineering solution removing the mutual exclusivity.⁴ Further, the Auction No. 83 Public Notice at Appendix A was clear in stating that:

Commercial applications that remain mutually exclusive after the settlement period closes will proceed to auction.

Thus, non-commercial applicants for NCE stations at the time of the filing of Auction No. 83 applications had no expectation that their applications would go to auction.

In previous broadcast station auction proceedings, however, the FCC granted a waiver to those applicants who specified NCE status on their Form 175 applications to allow NCE applicants to submit a major change to their Form 175 applications to specify a commercial, rather than an NCE, facility. This waiver from NCE to commercial application status was granted to AM applicants in Auction No. 84⁵, and to FM applicants in Auction No. 37.⁶

Given the equities and reasoning stated in the EMF and Prometheus filings, however, it is readily apparent that the public interest would not be served by the grant of such a waiver in Auction No. 83. EMF and Prometheus have made a compelling case that the thousands of NCE applications filed in Auction No. 83 may impact the ability of NCE applicants to apply for LPFM facilities. Under these circumstances, waivers such as those granted to NCE applicants in Auction No. 84 and Auction No. 37 should be summarily denied. Rather, NCE applications in

³ See e.g. <https://auctionfiling.fcc.gov/form175/search175/index.htm>

⁴ See *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Second Report and Order, 18 FCC Rcd 6691, 6699-6700 (2003). See also *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses*, First Report and Order, 13 FCC Rcd 15920, 15978-15980 (1998), recon. granted in part and denied in part, *Memorandum Opinion and Order*, 14 FCC Rcd 8724 (1999), further recon. granted in part and denied in part, *Memorandum Opinion and Order*, 14 FCC Rcd 12541 (1999).

⁵ See *Christian Broadcasting, Inc.*, 24 FCC Rcd 2212 (MB/WTB 2009).

⁶ See *American Family Association*, 19 FCC Rcd 18681, 18685 (MB/WTB 2004).

Auction No. 83 should simply remain on file as proposed by EMF and Prometheus, and be subject to over-filings by NCE applications for LPFM stations.

With respect to pending commercial FM translator applications in Auction No. 83, the undersigned commercial broadcasters propose that the FCC move forward with the processing of FM translator applications as initially ordered in the Auction No. 83 proceedings, with the one change in procedure being that NCE applicants that are not otherwise mutually exclusive with a grantable Auction No. 83 application as a result of a settlement or an auction, remain on file subject to over-filing by an LPFM application rather than being subject to dismissal or to NCE application processing procedures. With this proposal below, the interests of both EMF and Prometheus to maintain spectrum space for LPFM applications and for the hundreds of applications that EMF now has on file will be maintained while at the same time the interests of the undersigned commercial broadcasters, and the listening public, will likewise be served.

THE PROPOSAL

It is an essential aspect of the FM translator auction filing rules and procedures that an applicant for an NCE facility cannot go to auction. Rather, an NCE application, when mutually exclusive with a commercial translator application, would otherwise be dismissed, rather than go to auction. It is this aspect of the FM translator auction filing rules that will allow the FCC to accommodate the EMF and Prometheus proposals to defer the processing of the bulk of the NCE applications while at the same time moving forward with Auction No. 83 applications filed by commercial broadcasters.

The following is proposed:

- The Audio Division is requested to immediately open a settlement window for the FM translator applications now pending in Auction No. 83 to allow mutually exclusive applicants to settle, either by engineering amendments, or settlement agreements which remove mutual exclusivity. The singleton applications resulting from this settlement window should proceed to grant. Any NCE applications not otherwise mutually-exclusive with a translator application granted as a result of the settlement window should remain on file.⁷
- For Auction No. 83 FM translator applications that remain mutually-exclusive once the settlement window has opened and closed, those applications, if there is

⁷ Thus, in daisy-chain situations, in order to preserve for EMF and other similarly-situated non-commercial broadcasters maximum flexibility for their pending NCE FM translator applications or contemplated LPFM over-filings, pending NCE FM translator applications if conflicts remain, rather than being dismissed even if not mutually-exclusive with the resulting granted FM translator application, will remain on file to serve the stated goals of EMF and Prometheus. Or more simply put, if commercial Application "A" is in a mutually-exclusive group with NCE Applications "B", "C" and "D", but Application "A" is only directly mutually-exclusive with Application "B", upon a grant of Application "A", only Application "B" is dismissed, and NCE Applications "C" and "D" will remain pending.

mutual exclusivity between commercial applicants, will proceed to auction pursuant to the Commission's rules with any NCE applications dismissed that are mutually-exclusive with the granted auction winning application (if there is only one commercial applicant remaining, that applicant is granted without going to auction).⁸

- For application groups consisting only of NCE applicants, or for application groups where a commercial broadcaster does not proceed with a filing of a long form application, those NCE applicants, rather than being dismissed should remain on file but be subject to the opening of a filing window for LPFM applications as proposed by EMF and Prometheus.

The above procedures require only one change in the FCC's application processing procedures – that change is to defer groups of mutually-exclusive NCE applications as requested by EMF and Prometheus, rather than otherwise dismissing them or processing them using NCE application processing procedures. The thousands of NCE applications that are the subject of the EMF and Prometheus Memorandum of Agreement will not serve as impediments to the filing of LPFM applications provided that the FCC determines it wishes to proceed in this LPFM Proceeding as proposed by EMF and Prometheus. The commercial broadcasters who relied upon the Auction No. 83 Public Notice and the FCC's rules in preparing and filing applications for commercial FM translators will not be further harmed by the continuing delay in the processing of their applications.

This proposal will result in several public interest benefits. First and foremost, the thousands of NCE translator applications that are now pending will not serve as an impediment to the filing of additional LPFM applications as those applications will either be dismissed as mutually exclusive with a granted application per the Commission's rules, or be subject to over-filings by LPFM applicants in a subsequent LPFM filing window.

Additionally, those commercial broadcasters that in good faith filed commercial FM translator applications during the 2003 Auction No. 83 filing window will finally have their FM translator applications processed and will no longer be a concern to either Prometheus or EMF in the pursuit of their NCE and LPFM facilities.

NEW FM TRANSLATOR FILING WINDOW AND CARRIAGE OF AM STATIONS

Once the Commission resolves the questions raised in this LPFM Proceeding and an LPFM window is opened and closed, the Commission is requested to then quickly move forward with the opening of a filing window for new commercial FM translator applications. It has now been seven years since the opening of the Auction No. 83 FM translator window and there are many commercial broadcasters, especially those commercial broadcasters in smaller markets

⁸ As detailed in Footnote No. 7, NCE applications not mutually-exclusive with the granted application will remain on file rather than being dismissed.

with signal-deficient AM stations that wish to take advantage of filing for FM translators to enhance their AM signals.

Finally, the undersigned commercial broadcasters request that the Commission in this LPFM Proceeding waive the current restriction that new FM translators cannot carry the signals of AM radio stations. With the above procedures which remove the impediment to new LPFMs created by the thousands of NCE FM translator applications, there is no longer a need for such a restriction on AM station carriage as a discouragement to commercial broadcasters in further pursuing new FM translator applications for carriage of AM stations.

CONCLUSION

The FCC's purpose of bringing new broadcast service to listeners should not be thwarted and subsumed to the competing interests of commercial broadcasters, non-commercial broadcasters and LPFM broadcasters, all seeking to bring enhanced broadcast service to the public. Commercial broadcasters should be accommodated as well as NCE broadcasters and LPFM broadcasters in the award of FM translators.

The Prometheus and EMF proposals, while uniquely serving the interests of Prometheus and EMF and their constituencies, pointedly do not serve the interests of commercial broadcasters and the listening public who listen to commercial broadcast stations. Prometheus and EMF are proposing a change in the FCC's rules midstream, in essence yanking the rug out from those commercial broadcasters who followed the FCC's rules and policies in filing applications for translators in the Auction No. 83 FM translator filing window.

In moving forward with the above procedures, the FCC need make no changes to its rules or existing procedures in processing pending FM translator applications in Auction No. 83, except for maintaining on file rather than dismissing those NCE FM translator applications that remain mutually exclusive with one another. Maintaining those NCE FM translator applications on file will serve the interests of EMF, Prometheus and other similarly-situated NCE applicants. Allowing for LPFM broadcasters to file applications mutually-exclusive with those NCE applications, as proposed in the September 22, 2010 joint filing of Prometheus and EMF will allow for additional spectrum space for LPFM applications as requested by both Prometheus and EMF.

Accordingly, it is requested that the Commission immediately open a settlement window for the existing applications in Auction No. 83, and thereafter proceed to an auction with applicants for commercial facilities, with a view toward allowing those applicants that filed FM translator applications in the Auction No. 83 filing window in good faith to utilize the existing and settled procedures set forth in the FCC's Public Notice and rules to have their FM translator applications processed.

Respectfully submitted,

**THE CROMWELL GROUP, INC. OF ILLINOIS
HANCOCK COMMUNICATIONS, INC.
TWO PETAZ, INC.
WEJT, INC.
WHQQ, INC.
WLME, INC.
WSHY, INC.
WYCQ, INC.
SIERRA BROADCASTING CORPORATION
GEORGIA-CAROLINA RADIOCASTING COMPANY, LLC
KASKASKIA BROADCASTING, INC.
VIRDEN BROADCASTING CORP.
EAST KENTUCKY BROADCASTING CORPORATION
EAST KENTUCKY RADIO NETWORK, INC.
MILNER BROADCASTING COMPANY
PRIORITY COMMUNICATIONS, INC
COOL RADIO, LLC
CARL TUTERA
PHILIP H. HAYES
BOND BROADCASTING, INC.
EAST ARKANSAS BROADCASTERS, INC.**

By /s/ John F. Garziglia
John F. Garziglia
Their Attorney

cc: Peter H. Doyle, Chief, Audio Division, Media Bureau